Md Zaini bin Abdullah & Ors v Panasonic Automotive Systems

HIGH COURT (PENANG) — CIVIL APPEAL NO PA-16–3–04 OF 2021
KENNETH ST JAMES JC
18 APRIL 2022

Employment — Pay — Overtime — Employees in engineering firm complained to Labour Department that they were not paid overtime as prescribed under the Employment Act 1955 ('EA') — Labour Officer dismissed their claim on ground they were not employees 'engaged in manual labour' — Whether facts showed employees used predominantly mental effort at work with incidental or ancillary physical effort — Whether Labour Officer's decision was not erroneous or plainly wrong but a reasonable one arrived at after full appreciation of all the evidence

The appellants, who comprised a supervisor storekeeper, two engineering assistants and a maintenance technician — all employed by the respondent — filed a complaint with the Director-General of Labour ('the DG') under s 69 of the Employment Act 1955 ('the EA') that the respondent had failed to pay them overtime payment at the rate prescribed under the EA. The DG, through the Labour Officer ('LO'), dismissed their claims after finding that they were not 'engaged in manual labour' in their employment. In the instant appeal against that decision, the issue was whether the appellants carried out work that was substantially or purely physical in nature with very little or no mental effort (to come within the definition of 'engaged in manual labour') or whether their work was primarily and substantially dependent on the application of acquired skill, knowledge or experience but with incidental or ancillary manual effort. The appellants insisted that they fell under the former category, but the LO found, after a hearing, that their job functions required 'the use of a high level of intellectual thinking' as opposed to mere physical effort — that the supervisor storekeeper appellant's job functions were executive and managerial in nature while the three other were highly skilled persons who, inter alia, managed a variety of production equipment including trouble-shooting and solving problems associated with such machinery.

Held, dismissing the appeals with costs:

(1) The Labour Officer's analysis of the evidence and her decision was not plainly wrong or fundamentally erroneous. She had sufficiently appreciated the evidence and come to a reasonable decision. The court would not, therefore, interfere with the her findings. This court also found that the dominant element in the appellants' work was mental effort and that their physical effort was merely ancillary to it. They used

their minds and intellect more than physical movements to carry out what their minds instructed them to do in applying skills that had been acquired through much training and experience(see paras 42–43 & 49).

(2) The court did not agree with the appellants' contention that the Labour Officer had used a wrong test and should have compared the amount of time that they spent doing manual labour against the amount of time they spent doing mental work in order to determine if the manual-labour component exceeded one-half of their total time at work as prescribed in s 2(1) of the First Schedule of the Employment Act 1955. Their suggestion was not the correct test to apply and was unnecessarily impractical and restrictive. At the hearing of a claim for overtime, when the first instance court was conducting the 'dominant effort test', it was not necessary to perform such a comparative mathematical analysis (see paras 44–48).

[Bahasa Malaysia summary

Perayu-perayu yang merupakan penyelia penjaga stor, dua pembantu jurutera dan seorang juruteknik penyelenggaraan — bekerja dengan responden — telah memfailkan aduan kepada Ketua Pengarah Buruh ('KPB') di bawah s 69 Akta Kerja 1955 ('AK') atas alasan bahawa responden telah gagal membayar bayaran lebih masa menurut kadar yang ditetapkan di bawah AK. KPB, melalui Pegawai Buruh ('PB'), menolak tuntutan mereka setelah mendapati bahawa mereka tidak 'terlibat dalam buruh manual' di dalam pekerjaan mereka. Di dalam rayuan ini terhadap keputusan tersebut, isunya adalah sama ada perayu-perayu telah menjalankan kerja secara signifikan atau dengan cara fizikal yang sikit atau tiada usaha secara mental (untuk menepati maksud 'terlibat dalam buruh manual') atau sama ada kerja mereka adalah bergantung kepada kemahiran, pengetahuan atau pengalaman mereka tetapi dengan usaha manual sampingan. Perayu menegaskan bahawa mereka berada di bawah kategori sebelumnya, tetapi PB mendapati bahawa setelah pendengaran, bahawa fungsi pekerjaan mereka memerlukan 'penggunaan tahap pemikiran intelektual yang tinggi' berbanding dengan usaha fizikal semata-mata — fungsi pekerjaan penjaga stor penyelia adalah bersifat eksekutif dan pengurusan manakala tiga yang lain adalah orang yang berkemahiran tinggi, antara lain, menguruskan pelbagai peralatan pengeluaran termasuk *trouble-shooting* dan menyelesaikan masalah yang berkaitan dengan jentera tersebut.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Penelitian Pegawai Buruh terhadap keterangan dan keputusannya tidak salah. Beliau telah meneliti keterangan dan membuat keputusan yang munasabah. Oleh itu, mahkamah ini tidak akan mengganggu keputusannya. Mahkamah ini juga mendapati bahawa elemen dominan dalam kerja perayu adalah usaha mental dan usaha fizikal mereka hanyalah sampingan kepadanya. Mereka menggunakan minda dan

A intelek mereka lebih daripada usaha fizikal untuk melaksanakan perkara yang diarahkan oleh minda mereka dalam menerapkan kemahiran yang telah diperoleh melalui latihan dan pengalaman (lihat perenggan 42–43 & 49).

B (2) Mahkamah ini tidak bersetuju dengan hujahan perayu bahawa Pegawai Buruh telah menggunakan ujian yang salah dan sepatutnya membandingkan jumlah masa yang dihabiskan untuk melakukan kerja manual dengan jumlah masa yang dihabiskan untuk melakukan kerja secara mental untuk menentukan sama ada komponen buruh manual
C melebihi separuh daripada jumlah masa mereka di tempat kerja seperti yang ditetapkan dalam s 2(1) Jadual Pertama Akta Kerja 1955. Hujahan tersebut bukanlah ujian yang betul untuk digunakan dan tidak praktikal dan tidak meluas. Pada hari pendengaran untuk tuntutan untuk kerja lebih masa, mahkamah telah menjalankan 'ujian usaha dominan'. Oleh
D yang demikian, adalah tidak perlu melakukan analisis matematik perbandingan tersebut (lihat perenggan 44–48).]

Cases referred to

E *Chareon Pokphand Jaya Farm (M) Sdn Bhd v Chung Lin* [2006] 1 CLJ 784, HC (folld)

Colgate Palmolive Sdn Bhd v Cheong Foo Weng [2001] MLJU 719; [2001] LNS 394, HC (folld)

Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600, SC
F (refd)

Leighton Contractors (M) Sdn Bhd v Gnanapragasam a/l Arukiam & Ors [2016] 11 MLJ 559; [2016] 5 AMR 321; [2016] 4 ILJ 3; [2018] 2 ILR 193; [2018] 4 CLJ 800, HC (folld)

Lithographic Artists, Re (1913) 108 LT 894, Ch D (refd)

G *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 8 AMR 227; [2020] 10 CLJ 1, FC (refd)

Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177; [2018] 1 AMR 517; [2018] 2 CLJ 641,
H FC (refd)

UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2011] 1 AMCR 338; [2010] 9 CLJ 785, FC (refd)

I **Legislation referred to**

Employment Act 1955 ss 2, 69, First Schedule, para 2(1)

Palaniappan Ramasamy (Palani) for the appellant.
Eric Cheah Woon Leng (Hong Cheah & Co) for the respondent.

Kenneth St James JC:

PROLEGOMENON

[1] Are the appellants entitled to overtime pay? The lead appellant — Zaini — is a supervisor storekeeper. Two other appellants—Khairul and Firdaus—are engineering assistants. The fourth — Danial — is a maintenance technician.

[2] They brought a claim against Panasonic under s 69 of the Employment Act 1955 ('the Employment Act') for the non-payment of overtime pay at the rate prescribed under the Employment Act. The Director General of Labour, through the Labour Officer, dismissed their claims. They appealed to the High Court.

[3] The determinant issue to be decided is whether they are persons 'engaged in manual labour'. They are deemed to be 'engaged in manual labour' if they perform manual labour *more than half the total time of their working hours.*

THE APPLICABLE PROVISIONS OF THE EMPLOYMENT ACT

[4] Section 2 of the Employment Act defines an 'employee' to include 'any person or class of persons included in any category in the First Schedule'.

[5] The First Schedule, by its sub-s 2(1), categorises 'employee' as:

> 2 Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which —
>
> (1) he is *engaged in manual labour* including such labour as an artisan or apprentice:
>
> *provided that* where a person is employed by one employer *partly in manual labour and partly in some other capacity* such person *shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour* in any one wage period *exceeds one-half of the total time during which he is required to work* in such wage period;

MANUAL LABOUR AS DISTINCT FROM MENTAL LABOUR

[6] Manual labour is labour that uses the physical faculties of the body; labour that exhibits physical skill; the 'work of the hands'.

[7] Labour in 'some other capacity' would have to be *non-manual labour*, which in my view would necessarily be mental labour; labour that uses the mental faculty; labour that exercises the mind; labour that exhibits mental knowledge or mental skill; labour that uses the intellect; 'labour of the brain

and intelligence' (per Warrington J in *Re Lithographic Artists* (1913) 108 LT 894 at p 986.

[8] I am guided by, and agree with, the reasoning of His Lordship Faiza Tamby Chik J in *Colgate Palmolive Sdn Bhd v Cheong Foo Weng* [2001] MLJU 719; [2001] LNS 394 (HC), and His Lordship Suriyadi Halim Omar J (as he then was) in *Chareon Pokphand Jaya Farm (M) Sdn Bhd v Chung Lin* [2006] 1 CLJ 784 (HC). They were of the view that it is difficult to separate manual labour from mental labour, or to think about manual labour as distinct from mental labour. Invariably, all labour uses both the body and the mind. The question then is: *how much* of the body and *how much* of the mind?

[9] In *Colgate Palmolive*, His Lordship Faiza Tamby Chik J said this:

> 2. ... a distinction must be drawn between manual labour and manual work. Manual labour is manual work which requires toil and effort. This distinction was made by Lord Esher MR in *Bound v Lawrence* [1892] 1 QB 226 as follows:
>
> > There can be no manual labour without the use of the hands; but it does not follow that every use of the hands is manual labour, so as to make the person who does it a manual labourer.

Thus, whilst all manual labour would entail some manual work, it cannot be readily assumed that the person performing the manual work is a manual labourer and further it can not also be accepted that the person is in law 'engaged in manual labour'. It is clear from the authorities on this point that the test postulated by the courts to determine whether or not a person is 'engaged in manual labour' is as follows:

> *what is the substantial/dominant purpose of the employment, to the exclusion of the matters which are incidental or accessory to the employment?*

Thus, it is essential to determine whether the work in question is purely physical in nature, as opposed to work which has a physical/manual content but which is really dependent upon acquired skill, knowledge or experience. In law, *a person is not deemed to be 'engaged in manual labour' if his job functions are primarily and substantially dependent on his acquired skill, knowledge or experience but with incidental manual work. Conversely, a person is in law 'engaged in manual labour' if his duties are substantially or purely physical in nature with every little or no mental effort.* (Emphasis added.)

[10] In *Chareon Pokphand*, His Lordship Suriyadi Halim Omar J (as he then was) reasoned it like this:

> [16] Despite my attempts, regretfully I failed to identify any reasonable form of occupation that does not get the hands involved in some form or other. By analogy

> even a judge, who depends on his training and wisdom in the course of dispensing justice, cannot do without his hands when recording the evidence, opening the law books, handling the exhibits, and the like. Surely that judge cannot be said to be engaged in manual work, with his intellectual expertise merely incidental to his expertise and duties? It is my view that *the decisive factor to be considered, especially when the expertise or technical knowledge and hands are required to work side by side, the court will have to decide which will be more primary or predominant. If the hands are merely incidental then it cannot be said that the worker has been engaged in manual labour* ... (Emphasis added.)

[11] So, from the authorities, the test to decide whether a person is 'engaged in manual labour' is — what is the *dominant or primary effort* involved in the work, as distinct from the *incidental or ancillary effort* involved in the work.

[12] It is my view that 'dominant' necessarily means 'exceeding one-half of the total time' (as prescribed in sub-s 2(1) of the First Schedule). Or, to put it mathematically — more than 50%.

CASE LAW ON WHETHER A PERSON IS ENTITLED TO OVERTIME

[13] I am guided by these three authorities: (1) *Colgate Palmolive*; (2) *Chareon Pokphand*; and (3) *Leighton Contractors (M) Sdn Bhd v Gnanapragasam a/l Arukiam & Ors* [2016] 11 MLJ 559; [2016] 5 AMR 321; [2016] 4 ILJ 3; [2018] 2 ILR 193; [2018] 4 CLJ 800.

[14] In *Colgate Palmolive*, His Lordship Faiza Tamby Chik J decided that a senior craftsman, an electrical technician, an instrument technician, a waste water technician and a boiler attendant, were not engaged in manual labour. His Lordship held that they were not entitled to overtime.

[15] This extract from the case describes the work that the respondents there did, and discloses His Lordship's reasoning:

> 5. ... If the Director General of Labour had appreciated the relevant principles and then applied them to the evidence adduced in this case, he would have concluded that all the Respondents were not engaged in manual labour. This may be seen from the following parts of evidence in respect of the different categories of work in this case:
>
> (a) Senior Craftsman
>
> (i) I decide on whether the machine chain has to be changed or not ...
>
> (ii) When the machine is not running smoothly, I apply my mind to it and adjust. I don't supervise. I do give advise to new craftsman. I do give them training ...

(iii) Yes I decide to change and replace parts if it is faulty and I decide on this ...

(iv) I also confirm that I decide on matters of purchase of spare parts ...

(v) If small items and on emergency basis I do decide to make orders ...

(b) Electrical Technician

(i) I have a chargeman's certificate. I have to learn about electrical work and after two years I can apply and I have to sit for an electrical exams I have to read books on this subject to sit for the exam ...

(ii) In troubleshooting I look into the problems. I have to apply my mind and then to repair it ...

(iii) Yes if there is a problem I decide as to how to solve and I solve it ...

(iv) During the night shift, if there is something I have to decide, yes, I decide it ...

(v) I am an experienced electrician. I consider my job an important one and a job of an electrician is important ...

(vi) When a motor is not working, I check the starter then check the supply, incoming supply, then the fuses. Then I check the motor itself. So I determine the problem, set my mind to it then solve the problem. In a few cases I also refer to diagrams, boilers and my supervisor ...

(vii) In the grave shift my supervisor is not present. Yes during the grave shift I am in control during this shift and I attend to the problems. This duty is very important because dealing with electricity ...

(viii) Major task 2, my area is high voltage area, substation and not everybody can go into area. Only those qualified like me ...

(c) Instrument Technician

(i) I have had experience before I joined Colgate Palmolive. Since 1970. 13 years as Instrument Technician. I am an experienced technician ...

(ii) Troubleshooting is to identify the problem, apply my mind to it and then to repair it ... I work on my own and I make decisions to solve the problems ...

(iii) If there are new equipment then I need training to collaborate and to maintain them. My training is by having a briefing as to how the system works ...

(iv) Under work place I have an instrument room with my own desk ...

(v) Yes I am an experienced staff, I do bring in my input in my discussions. I do make recommendations and suggestions ...

(d) Waste Water Technician

(i) I perform an important job. I don't quite agree that I perform a non-administrative and admin function. I do collect raw water sample and do analysis. I do put these results into a computer. I do, after inputing this information, print out daily and weekly reports. Lately, I've been keeping delivery orders and purchase orders of lime sulphuric acid ... I telephone suppliers to deliver these items ... Yes, I determine the shortage and then inform the engineer and he informs me to inform the supplier to deliver the order ... I do prepare a daily log book. I put in any breakdown or any maintenance work that need to be done. I don't consider inputting information into the computer, making orders as administrative duties but I do perform them. I do perform lab work ...

(ii) Initially they incubate the sample in the incubator and after five days take out the sample and take the reading. Then we calculate the difference from the formula given by my superior. This is done daily. I keep records of this...

(iii) During the grave shift, the Engineer is not present ... I am in charge. During the eight years I worked with the engineers. Around 2 years I worked without the engineer during the grave shift...

(iv) I do supervise people below me. At present there is one person. For the past eight years there would be 4–5 people under me. I supervised their work. No, I don't train them. Yes I assist in training them. Yes I He s a contract worker who is with me for two months or more. As to the earlier, 4, 1 don't train to assist them but I instruct them ...

(e) Boiler Attendant

(i) This job requires high level of concentration and it is a specialised job. No others can do it ...

(ii) I do not perform supervisory function. I work alone in every shift. Item 1 is the major task in exhibit CO4. We suggest and recommend to the company and only a qualified boilerman can make such suggestions ... These are functions only a boilerman can perform ...

Therefore I think if the aforesaid evidence had been properly appreciated, the Director General of Labour would have found that the substantial/dominant purpose of the respondents work was non- manual work as it required 'the labour of the brain and intelligence' as well as their acquired skill, knowledge or experience. *The Respondents use of hands in carrying out their day to day tasks should not therefore negate or obliterate the more substantial/dominant purpose of their employment, which is the use of their minds and their diagnostic skills.* The Director General of Labour had obviously viewed the facts before him very superficially thus failing to appreciate that without the use of their mind, knowledge and vast acquired experience in their respective fields, the Respondents would have been paralysed in performing their daily functions. Accordingly, the claim is hereby dismissed. (Emphasis added.)

[16] In *Chareon Pokphand*, His Lordship Suriyadi Halim Omar J (as he then was) held that an electrical chargeman, who was promoted to maintenance

executive, was not engaged in manual labour. His Lordship similarly held that the electrical chargeman was not entitled to overtime.

[17] This was how His Lordship described the work that was done by the respondent there:

> [3] In the course of the proceedings at the Labour Office, the respondent testified that as an electrical chargeman, amongst others, he was in charge of maintenance, maintaining electrical breakdown, servicing electrical equipments, keeping clean the sub-station, trouble shooting and repairing electrical equipments.

[18] Then, in *Leighton Contractors*, there was a different outcome. His Lordship Collin Lawrence Sequerah JC (as he then was) decided that train assistants or shunters were engaged in manual labour, and hence were entitled to overtime. His Lordship described the work done by the respondents there, and the reason for his decision, like this:

> [14] Although there was no evidence of their job description in order to describe their duties as shunter/train assistants, from the evidence adduced at the Labour Court, the nature of work performed included displaying signals (flags) to the train drivers, train marshalling, separating the train coaches and reducing the number of coaches known as shunting movement, vacuum pipe with bare hands, pulling lever and tumber point, fixing vacuum pack and connecting the coaches, assembling coach or arranging coach lots, operating level point, attaching and dissecting vacuum poch, checking all brakes and releasing brakes, detaching and reattaching coaches, round the engine from front to the back, loading and unloading ballast and following the train from Sungai Petani to Padang Besar or from Bukit Mertajam to Padang Besar.
>
> ...
>
> [22] The necessity of the respondent's in exercising their judgement when indicating the signals to move or stop to the train assistant, or the fact that they would need to communicate with the train driver during shunting movements does not take the work performed out of the scope of 'being engaged in manual labour'. No form of work can be altogether taken to be mindless. Even an iron smith must exercise some reasonable skill and exercise of judgement in the forging of articles of iron. No one would readily dispute that he is engaged in manual labour.
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> [23] Notwithstanding that the respondent's had to exercise some judgement when indicating the signals to move or stop to the train assistant, or the fact that they were required to communicate with the train driver during shunting movements, the substantial or dominant purpose of their work was spent engaged in manual work, a large portion of which involved shunting movements (where coaches were detached, rearranged, reduced and reattached) which took about one to one and a half hours with the frequency ranging from four to five times per day.
>
> [24] *Such work cannot be reasonably classified as anything other than manual labour.* No paperwork was involved and neither did such work require any exercise of an

intellectual nature. *It was purely mechanical and physical in nature.* (Emphasis added.)

EVIDENCE OF THE APPLELLANTS' WORK

[19] Applying this dominant effort test — whether or not the appellants were 'engaged in manual labour' is a question of fact. Each case should be decided on its own facts, and on the evidence of those facts.

[20] In a matter involving a claim for overtime such as this, I am of the view that the relevant evidence to consider include — the documentary evidence relating to the claimants' (here, the appellants') work; their testimonies — particularly when under cross-examination; and the testimonies of persons who worked with them, such as their superiors, their peers or their subordinates.

[21] I point out 'particularly under cross-examination' because the appellants, in their testimonies, were *insistent* that they performed only manual labour; that their work involved little or no mental application.

[22] Zaini insisted that he is just a manual labourer, although he is a Supervisor and his work entailed much paperwork. Khairul, Firdaus and Danial likewise testified that they performed manual labour, even though they are highly skilled and experienced in their respective jobs. And even though their work required much mental focus.

[23] It is apparent that it is in their self-interest to assert that they perform only manual labour.

[24] The Labour Officer, however, after the hearing, made findings about the appellants' work that led her to decide that the appellants *did not engage in manual labour*. And hence that they are not entitled to overtime pay.

THE LABOUR OFFICER'S FINDINGS

[25] The Labour Officer's findings include the following findings.

[26] Zaini — (1) approved the leave applications of his subordinates; (2) signed gate passes for his subordinates; (3) had a supervisory responsibility over his subordinates; and (4) exercised an executive, even managerial, capacity in his job.

[27] Khairul — (1) maintained machines to support production and during breakdowns; (2) performed highly diversified duties: to install, to troubleshoot

problems, to repair and maintain production equipment; (3) performed jig fabrication according to job requests ie he customised jigs (a jig is a device or tool that supports the making of the products); (4) attended to both emergency and scheduled repairs; (5) liaised with clients; (6) played a prominent role in the production process; (7) his work reduced the downtime in production; and (8) he is highly trained and qualified.

[28] Firdaus — (1) has multiple certificates; (2) is highly skilled and trained; (3) handled all types of machinery; (4) in the night shift, he is the person who solved or managed the problems; and (5) no one else has his skills.

[29] The Labour Officer also noted that Firdaus tried to 'menyembunyikan kemahiran yang tinggi serta tanggungjawab yang berat' (conceal his expert skills and heavy responsibility).

[30] And Danial — (1) managed the machine used for jig fabrication; (2) maintained and repaired the conveyor and lifters, to ensure a smooth production and minimise downtime; (3)maintained and repaired the clean room cushion detection jigs; (4) maintained and repaired the wonder gun vacuum unit; (5) fabricated jigs for new models according to the production team's request ie he too customised jigs; and (6) can do what an engineer can do.

[31] Apprised with these findings, the Labour Officer analysed whether the appellants' predominant or primary work involved only the use of their hands, or whether they use mostly their minds. Her analyses included these remarks.

[32] For Zaini, the Labour Officer found that Zaini's 'fungsi-fungsi kerja berstatus eksekutif dan pengurusan' (Zaini's work functions are executive and managerial in nature).

[33] For all four of them, the Labour Officer found that their 'tugas-tugas utama' involved the 'penggunaan intelek thinking yang tinggi' (their main tasks required the use of a high level of intellectual thinking).

[34] Premised on such findings, the Labour Officer dismissed the appellants' claim for overtime pay.

APPELLATE INITERVENTION: THE CURRENT POSITION OF THE 'PLAINLY WRONG' TEST

[35] An appellate court should only interfere to disturb the findings of the first instance court or tribunal, if that court or tribunal was 'plainly wrong' in its decision.

[36] The 'plainly wrong' principle for appellate intervention has developed in the United Kingdom and in Malaysia for over a century.

[37] Our Federal Court, in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 8 AMR 227; [2020] 10 CLJ 1 (FC), through the eloquent written grounds of Her Ladyship Zabariah Mohd Yusof FCJ, comprehensively expounded the genesis of the 'plainly wrong' principle, through its development, into its current meaning.

[38] *Ng Hoo Kui* propounded that the primary 'plainly wrong' principle, includes the following not-exhaustive elaborative principles:

(a) the first instance court's decision is 'plainly wrong' if it was arrived at through 'no or insufficient judicial appreciation of the evidence': referring to *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2011] 1 AMCR 338; [2010] 9 CLJ 785 (FC):

(b) this phrase of the 'lack of judicial appreciation of the evidence' encompasses these three errors:

  (i) critical factual finding which has no basis in evidence (findings not based on the evidence);

  (ii) demonstrable misunderstanding of the relevant evidence (misunderstanding the evidence); and

  (iii) demonstrable failure to consider the relevant evidence (failure to consider the evidence).

(c) a first instance court's decision is 'plainly wrong' if it was arrived at through a 'material error of law': following *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600 (UKSC);

(d) the first instance court's decision is 'plainly wrong' if it 'could not reasonably be explained or justified', making it a decision 'which no reasonable judge could have reached': *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177; [2018] 1 AMR 517; [2018] 2 CLJ 641 (FC); and

(e) an appellate court is to evaluate whether the first instance court's decision was 'reasonably made': para 77 of *Ng Hoo Kui*.

[39] However, the 'plainly wrong' principle is not intended to be used as a catch-all method to replace the first instance court's decision with its *own* (the appellate court's) decision, on the facts of the case. The Federal Court in *Ng Hoo Kui* puts it this way:

A [76] What is pertinent is that, the 'plainly wrong' test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.

...

B [78] Hence following this court's ruling in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra* an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks C that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[40] Put differently — even if an appellate court finds, on the evidence and D the facts of a case, that the appellate court would have come to a different decision, the appellate court *should not by-pass an analysis of the first instance court's reasoning* when it is deciding on the appeal.

[41] The appellate court must consider the first instance court's appreciation E of the evidence in the context of these elaborative principles, to see if the first instance court has committed a fundamental error.

[42] Applying these elaborative principles to this appeal, I do not find that the Labour Officer's analysis of the evidence, and her conclusion on the F evidence, to be 'plainly wrong'; or fundamentally erroneous; or that the Labour Officer had not sufficiently appreciated the evidence; or that the Labour Officer's decision was not reasonably made.

[43] And so, I will not interfere with the findings of the Labour Officer.

G

ANOTHER ISSUE

[44] It was argued by the appellants that the Labour Officer used the wrong test. It was argued that in order for the Labour Officer to determine whether H the manual labour component of the appellants' work 'exceeds one-half of the total time' (as prescribed in sub-s 2(1) of the First Schedule) — the Labour Officer should have *compared* the *amount of time* that the appellants spent doing manual labour against the *amount of time* that they spent doing mental work.

I

[45] But I do not find this suggestion to be the correct test to apply.

[46] I find that it should not be necessary to perform a *minute and elaborate computation* of how many *hours* or *minutes* the appellants worked with their

hands, and compare that to how many *hours* or *minutes* they worked with their minds — in order to decide if the manual labour 'exceeds one-half of the total time'.

[47] It is *unnecessarily impractical*, and *restrictive*, to perform such an exercise to split-up the appellants' work-time in this manner.

[48] I hold that at the hearing of the claim for overtime, when the first instance court is conducting the dominant effort test, it is not necessary to perform this manner of *comparative mathematical analysis*.

CONCLUSION

[49] I too find that the dominant element of the appellants' work is mental effort. The physical effort is ancillary to the mental component of their work. They use their mind and intellect, with the skills acquired through training and experience. They use their mind and intellect more than the physical movements required to carry out what their minds instruct their bodies to do. Their work triggers mostly *a cerebral response*, which then leads to a lesser secondary physical movement.

[50] More pertinently, I do not find that the Labour Officer's reasoning and decision to be plainly wrong or unreasonably arrived at.

[51] As such, I dismiss the appellants' respective appeals with costs.

Appeals dismissed with costs.

Reported by Ashok Kumar